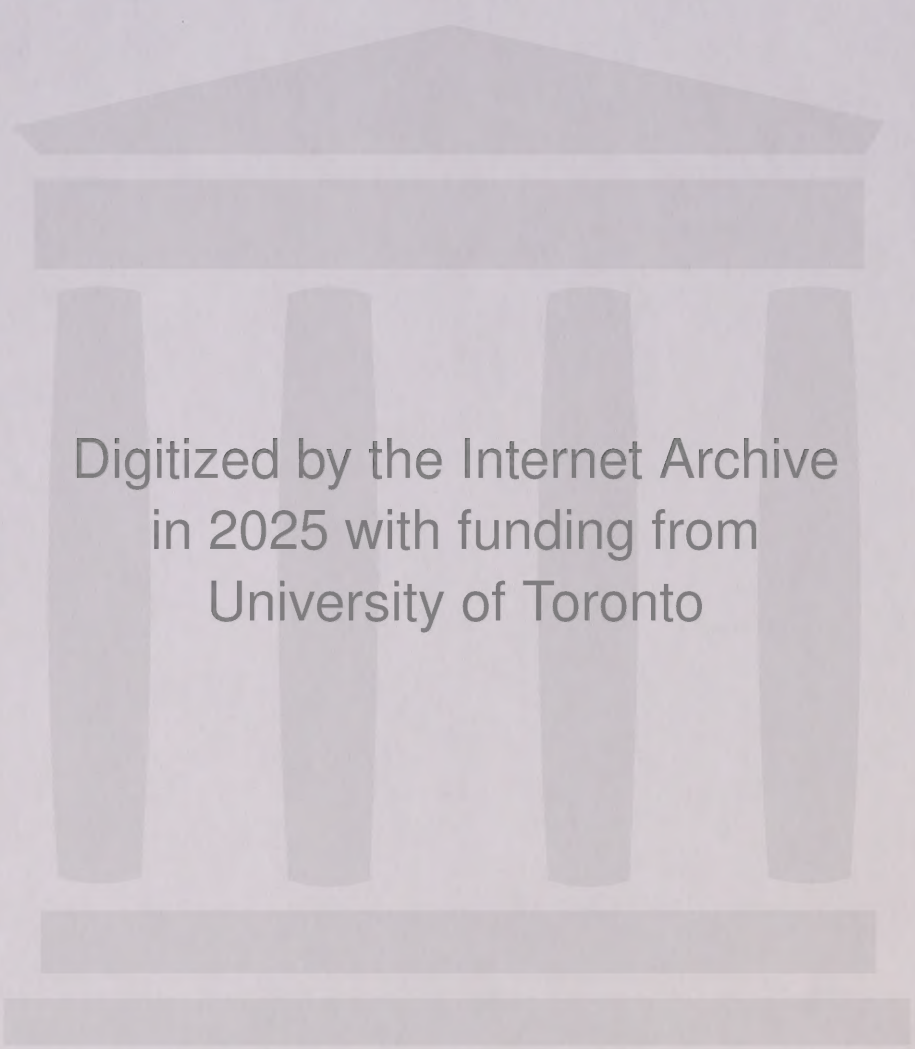
[Miscellaneous documents]

Copy of Judgment of
Hon Mr Justice Rose
10th March 192[illegible]
Attorney General of Ontario
vs
Great Lakes Paper Co. Ltd



K. B.	Copy of Judgment of Rose, J., delivered
ATTORNEY GENERAL OF ONTARIO	10th March, 1921.
V.	G. H. Kilmer, K.C. C. S. MacInnes, K.C., and J. C. Robinson, for plaintiff.
The GREAT LAKES PAPER CO. LIMITED.	L. F. Hellmuth, K. C., and A.M. Stewart, for defendants.

In this action the Attorney General, suing on behalf of His Majesty, seeks a declaration that, in virtue of an agreement alleged to have been made, in or about the month of March, 1917, between the Government and a predecessor in title of the defendants, the defendants are bound to take from His Majesty through the Hydro-Electric Power Commission of Ontario, at cost, the supply of electrical power requisite to operate certain mills and plant which the defendants, as the holders of two concessions to cut pulp wood on lands of the Crown, are under obligation to erect and operate; and an injunction is asked to restrain the defendants from obtaining otherwise than from His Majesty through the Commission the said supply of electrical power, or any part thereof. The defendants deny that their predecessor in title entered into the alleged contract and they say that even if the contract was made it is not binding upon them; and they ask for a declaration that His Majesty is bound by agreement to grant to them a lease of a suitable water power, which they may develop for themselves, and that they are entitled to damages for default in granting such lease; also a declaration that they are at liberty to obtain their electrical power from whom they will.

Some time before December 1916, the Government advertised for tenders for the right to cut pulp wood and pine on a certain area on the north shore of Lake Superior, a hundred or more miles east of Port Arthur, called the Pic River Pulp and Timber Limit; and some time before February 1917, they advertised for tenders for similar concessions on another area north of Port Arthur called the Black Sturgeon River Pulp and Timber Limit. The successful tenderers were for the Pic River Limit, J. J. Carrick, and for the Black Sturgeon River Limit, S.A.Marks.

The Conditions upon which the two concessions were offered

were similar. In each case the successful tenderer bound himself, amongst other things, to enter into an agreement with the Government to erect on the limit, or at some other approved place, a pulp mill costing with its equipment, etc., not less than one million dollars, and to operate it so that its daily output should be at least 150 tons of pulp, and so that, on the average, 300 hands should be employed during ten months of each year. Of the million dollars, 200,000 were to be spent in the first year, 350,000 in the second year, and the balance in the third year. The agreement was also to provide that the tenderer should erect, at such time and place as should be directed, a paper mill of the capacity of at least 100 tons of paper per day, and should operate it so that the daily output should not be less than 75 tons. In each case the successful tenderer was to be entitled to obtain a lease from the Crown, upon the usual terms, of some suitable water power either within the limit or at some other suitable point within the Province, as might be agreed upon, the lease to be subject to such conditions and stipulation as the Minister of Lands, Forests and Mines might deem expedient, and to contain a provision for the development of the power to the full extent thereby required according to plans and specifications approved by the Hydro Electric Power Commission.

Mr. Carrick was notified on December 13, 1916, that his tender for the Pic River Concession had been accepted, and he at once telegraphed that he was prepared to sign the formal contract whenever it should be got ready. Mr. Marks was notified on February 7th, 1917, that his tender for the Black Sturgeon Concession had been accepted and on February 17 he was told that the agreement was being prepared, and he was asked to name those who were financially interested with him in the undertaking. On February 20, he wrote giving the names of Mr. Carrick, and others as his associates; and on February 22, after he had examined the draft agreement, he wrote to the Deputy Minister saying:-"regarding clause 20, I wish you would expedite matters in connection with the water power lease which goes with this concession and the Pic. The understanding with the Minister was that a new lease of the Cameron Falls power should be granted in connection with the Pic Concession but a stipulation was made that power had to be furnished to the successful tenderer of the Black Sturgeon. There will likely be a consolidation of the Pic

and Black Sturgeon limits and the lease could either be made to Mr. Carrick or myself, or if it would be satisfactory to you, make it a joint lease in the names of Carrick and Marks. I wish you would take this matter up at once as we have gone as far as possible until we get the above lease". Later on, by a formal assignment dated May 8th, 1917, and assented to by the Deputy Minister on the same day. Mr. Marks assigned to Mr. Carrick all his right, title and interest in and to his tender and the acceptance thereof, thus affecting the "consolidation" foretold in the letter of February 22. As between Marks and Carrick however, the consolidation was, apparently effected at a time earlier than the date of the formal assignment, for Mr. Marks' name does not appear in any of the correspondence produced bearing date later than February 22, and the negotiations which are alleged to have resulted in the contract which the Attorney General seeks to enforce appear to have been negotiations between Mr. Carrick and the Government.

Neither side saw fit to adduce at the trial any parol evidence either as to what those negotiations were or as to what, if any, agreement was actually reached. The plaintiff says that the correspondence and the documents to which I shall refer show that the agreement set forth in the statement of claim was made, whereas the defendants say that the correspondence shows that it was not. This particular issue, then has to be determined by an analysis of the writings.

Under the conditions upon which the concessions were offered for sale, the successful tenderers were entitled, as has been stated, to obtain leases of water powers from the Crown, This was a privilege granted to them; they were in no sense bound to apply for the leases and they were quite free to operate their plants by steam or by any other power that they could obtain. The suggestion on the part of the plaintiff is, that Carrick's option to take a lease of such water power as he might need for the development of the electrical energy requisite to the operation of the plant to be established for the manufacture of the wood cut from the two limits, was converted, by agreement made between him and the Government, into a contract on the part of the Government to supply, and on his part to take power developed by the Hydro Electric Power Commission. This is the contract which the plaintiff seeks to compel the defendants to perform. It may be noted in passing, although it has no real bearing upon the matter in issue, that the defendants are willing to take power from the Government through the Commission and that there is no difficulty about the price to be paid, but that

the parties failed to agree upon the terms of a power contract. The only contract which the Commission is willing to execute contains conditions which the defendants say might be disastrous to their enterprise; and they are not willing to take power without a formal contract setting forth the conditions, and under a mere undertaking on the part of the Government to supply it " at cost".

On March 26, 1917, Mr. Carrick had an interview with the Prime Minister, of which there is a partial account in letters written to him on the 27th by the Prime Minister and the Minister of Lands, Forests and Mines. The defendants objected to the reception of these and of many other letters, some of them written by Carrick or on his behalf, on the ground that the statements contained in them are not evidence, as against the defendants, of the facts stated; and they were received subjects to the objection. I do not quite see how the expression in these letters which the Plaintiff would construe as statements that certain things were agreed upon between the Government and Carrick are evidence, as against the defendants, that such things were really agreed; but the letters--or parts of them--are admissible as the original evidence that certain things were done -e.g., that the Government requested Mr. Carrick to accept in satisfaction of the Government's obligation to grant a lease of a water power, the making available for his purposes of power developed by the Commission--and all of them will have to be referred to, an effort being made to use them only for the purposes for which it seems to have been proper to receive them in evidence.

The Prime Minister's letter of March 27th was as follows:

"In further reference to our conversation of yesterday, I beg to say that the Cities of Port Arthur and Fort William desire to make an arrangement with the Hydro Electric Power Commission for an ample supply of power for their use. In view of the present demands and future requirements of these Cities and the great importance of the Province retaining in its own control all large supplies of power near such great industrial centres as these Cities, I think that such powers should be reserved for development through the Hydro Electric Power Commission. Obviously this action would greatly benefit you in the operation of your pulpwood concessions.

"The development of Power by the Hydro Electric Commission in that district would not only permit of an ample supply for your

power requirements but also at the same time provide for the future requirements of the Cities at the head of the Lakes.

"I am not forgetful of what you urged with references to the conditions attached to the sale of the pulp limits in the Nipigon territory; but the spirit of that agreement would be fulfilled by the Hydro Electric Power Commission furnishing you with all the necessary electrical power to operate any plants that might be erected for the manufacture of the timber of these limits, and the Government, I am assured, will be able to make arrangements with the Hydro Electric Commission for Ontario for the supply of this power to you, and as the Hydro does not sell power at a porfit but at actual cost, such should be both beneficial and in all respects satisfactory to you.

" I have no doubt in addition to the Hydro supplying you power that the City of Port Arthur will be glad to meet you in your negotiations with the Hydro and by adding their demands for their City to your requirements for power, reduce the price to the lowest possible from the Hydro.

"With power at cost to the Hydro and with the large supply of raw material and the shipping facilities, both by rail and water now subsisting at the head of the Lakes you should have most favourable conditions for the future welfare of your enterprise. Such being the case it will therefore redound to the benefit of your industries and of that part of this Province and which of course this Government is anxious to see come to pass."

And the Letter from the Minister of Lands, Forests and Mines was as follows

"Under the conditions of sale of the Pic and Black Sturgeon Pulp and Timber Limits, the second last clause thereof provided that the successful tenderer shall be entitled to a lease of a water power from the Crown upon the usual terms &c (See clause 13).

"Since these tenders were received and accepted, the Government of the Province has decided, as a matter of Policy, and as now agreed upon with you, not to issue a lease of the Nipigon or other water powers contemplated, and in lieu thereof as the Premier has said in his letter to you of the 27th inst, the Government through the Hydro Electric Commission for the Province of Ontario, will arrange for the power to operate the mills necessary to manufacture the pulp and paper from such limits at some point adjacent to Port Arthur, satisfactory to you and the Department. "I naturally infer that such will be satisfactory

to you and your associates".

In the Spring of 1917 there was under consideration the development of water power by the Hydro Electric Commission for the purpose of supplying electrical energy for the use of the cities of Port Arthur and Fort William. On March 26, Mr. Carrick's solicitor wrote to the Chairman of the Commission, making an application--or asking what the rate would be--for power, and pointout that as Mr. Carrick would need 20,000 horsepower his requirements added to the requirements of the two cities would justify a development of 30,000 horse power. No agreement was reached between the Commission and Mr. Carrick, but, later on, the Commission, apparently in the belief that Mr. Carrick would be a customer decided to develop a water power at Cameron Falls which would be adequate to supply both him and the cities, whereas if the requirements of the cities alone had been considered the power could have been furnished by developing it at Dog Lake, at a much smaller capital expenditure. Herein lies the importance to the cities of securing the defendants as customers for power furnished through the Commission. The development at Cameron Falls is approaching completion, and if the cities are the only customers the rate per horse power which they will have to pay will be greater than the rate which would be charged them if the defendants were also customers, and greater also than the rate which would have been chargeable if the develo ment had been at Dog, Lake. The anxiety of the Government to compel the defendants to take power from them through the Commission is therefore quite natural.

To return now to the documentary evidence: The formal contract between the Government and Mr. Carrick giving to the latter the right to cut pulp wood and other wood on the two limits is dated May 9,1917 Instead of a pulp wood ~~and other~~ mill in connection with each limit to cost one million dollars, it provides for one mill to cost two million dollars, and instead of two paper mills, each of a capacity of 100 tons a day, it provides for one paper mill of 200 tons ~~ea~~ capacity. It is quite silent as to power.

On September 18, 1917, solicitors writing on behalf of Mr. Carrick wrote to the Minister of Lands, Forests and Mines, referring to the Minister's letter of March 27, in which he made "mention of the agreement between the Government and the Licensee, that the Government

would arrange for the supply of power necessary to operate the mills referred to in the license "and going on to say that Mr. Carrick and his associates desired to commence operations at once, and would like to know when power would be available, and also whether there would be objection on the part of the Government to Mr. Carrick's getting power from other sources in the meantime.

The next letters are letters written by Mr. Carrick to the Prime Minister and the Minister of Lands, Forests and Mines on (January 17,1918.) In them he points out that without a supply of power available he cannot proceed with his work and he asks to be advised that further action on his part under his agreement is not required until such time as the Government are able to proceed with the power development, which, as he says, was halted by the fact that it was not deemed to be in the public interest to raise lrge sums of money for public works during the War. He refers to the supply of power through the Hydro Electric Commission as something which "the Government volunteered to give in lieu of the stipulation offered by the Government in the call for tenders", and he says; "The Government in lieu of my relinquishing my rights toawater power specifically agreed to develop and supply me power at cost". (He does not say, in so many words, that he had agreed to take power through the Commission when it should be ready for delivery, or that his right, under the conditions of the tender, to have a lease or a water power had been changed into an obligation to take power from the Government; but he makes it quite plain that his intention had been, and still was, to use the Hydro Electric Power, and he seems to admit that the Chairman of the Commission had been within his rights in refusing him permission to obtain a temporary supply elsewhere.

On January 31, 1918, the Minister of Lands, Forest and Mines wrote to Mr. Carrick, saying, "until the power is available, the Department cannot fairly ask you to make the other expenditure in connection with the erection of your plant," and this was followed, three months later, by a formal agreement dated May 8, 1918, between the Government and Mr. Carrick which recited as follows; "Whereas it was agreed between the parties;.. that an adequate supply of electrical horse power should be available to the grantee to operate

"the pulp and paper mills stipulated for in the said agreement (of May9, 1917). And Whereas there is not yet available such power for the use of the grantee as aforesaid and it is agreed that the grantee shall not be required or called upon to perform and discharge the duties and obligations and to make the payments imposed upon him as in the said agreement set forth until an adequate supply of such power is made available for all such purposes," and went on to witness that the grantee (Carrick) should not be called upon or required to perform or enter upon the performance of the terms, conditions, duties or obligations, or any of them, and should not be deemed to be in any default whatsoever under the said agreement of May 9, 1917, until such time as an adequate supply of electrical power should be made available for him sufficient for the operation of the mills; and that the time for the construction of the mills was extended until such time as the said adequate supply of electrical power should be made available. Again there is not a word about any obligation on the part of Carrick to take the power when available.

By an assignment dated June 1, 1918, Mr. Carrick assigned to Messrs. G.M. Seaman and L. L. Alsted an undivided 51 one-hundredths share or interest in, under and to the agreement of May 8, 1917, together with a like share and interest in and to the licenses and concessions granted by the said agreement, "and in and to any and all other agreements in respect of the said matters or any of them which might "have been or might thereafter "be entered into between "the Government and himself, "whether by way of renewal, extension, enlargement, modification or otherwise, and in and to every right, interest, benefit, profit and advantage which might "accrue or be derived from the said agreements, licenses, concessions, pulpwood and timber or any one or more of them." By another assignment dated January 23, 1919, he assigned to Messrs. Seaman and Alsted another 15 2/3 per cent. interest in the things mentioned in the first assignment. By a similar assignment dated March 22, 1919, he assigned a 16 2/3 per cent. interest to Thmes Whalen, and by an assignment dated March 29, 1919, he assigned his remaining 16 2/3 per cent. interest to Messrs. Seaman and Alsted. Then by an assignment dated November 6, 1919, Mr. Whalen assigned to Mr. Seaman his 16 2/3 per cent. interest. All these assignments, except

the last one (Whalen to Seaman) were duly assented to by the Government. The last mentioned one was filed, but no assent to it was given. How the rights which by the assignments had become vested in Messrs. Seaman and Alsted were transferred to the defendant company does not appear, but the parties are agreed that the defendants are the owners of the concessions granted by the agreement of May 9, 1917; the dispute is as to their obligations.

Between the time of the first assignment by Mr. Carrick of a part of his interest to Messrs. Seaman and Alsted (June 1, 1918) and the time of his assignment to Mr. Whalen (March 22, 1919) he was negotiating with the Hydro Electric Power Commission as to the terms upon which power would be supplied, and he was asking the Government for assurances as to when power would be ready for him. The correspondence indicates that there were meetings with the Minister of Lands, Forests and Mines and with officers of the commission, but exactly what was discussed does not appear, and probably it is not important to enquire, for the contract upon which the Attorney General relies is alleged to have been made long before, viz., in or about March 1917, also the letters which passed during this period do not seem to contain anything of great importance; they show that Mr. Carrick was waiting for and was expecting to use Hydro-Electric power when it should be available, but they do not contain anything, if anything, that goes to show whether or not he thought he was bound to use it - even if letters written by him indicating what he thought on that subject would be evidence against the defendants.

The only other letters that need be referred to are some that passed between the Hydro Electric Commission and the Minister of Lands, Forests and Mines in the Spring of 1919. The Commission applied for a grant of land required for use in the Cameron Falls development. The Minister asked whether the development was being undertaken as a municipal enterprise, or on behalf of the Province. He was informed that it was being undertaken as a municipal enterprise, and that power contracts had been made with the two cities, and that it was "expected that the other pending contracts and agreements for power in the district (would) be completed in due course". He then wrote to the Secretary of the Commission a letter dated May 1, 1919 to which the

defendants attach great importance (without prejudice, however, to their position as to the admissibility of the correspondence generally) He said:- "Replying to yours of the 15th, the Commission is aware of the Government's undertaking to see that Carrick gets power to take care of his pulp mill requirements. This undertaking was given Carrick in lieu of the right to power he secured in connection with his purchase of the pulp area.

"The Government is in honour bound to see that this obligation is carried out, and until the actual completion of the substituted arrangement it would be scarcely proper for the Crown to part with the title and so place it out of its power to implement the undertaking given Mr. Carrick. I understand that he is now negotiating with the Commission, and I am hopeful if you have not already reached an arrangement, that you will be able to do so at an early date. This will relieve the Crown of its obligation under the sale and there will be no further reason why the title should not pass to the Commission. In the meantime you will readily understand that the Commission is taking no risk so far as expenditures on properties is concerned, because it has already been announced that the policy of the Government is that Nipigon Power should be developed by the Commission".

It is argued that this letter shows clearly that the result of the negotiations between the Government and Mr. Carrick in March 1917, was no more than this - viz, that Carrick, who was entitled to call for a lease of a water power, agreed not to insist upon his rights, if the Government made available for him power developed by the Commission, which he could take or not as he saw fit,, just as he might have used or not, as he saw fit, any electrical power which he might have developed for himself, if he had been granted a lease of a water power?

(After reading and re-reading the papers I am unable to find that it is proved as against the defendants that the agreement which the Attorney General seeks to enforece was ever made) indeed, I do not think that the making of it could have been said to have been proved as against Mr. Carrick if the endeavour had been to prove it as against him, instead of as against the present defendants. It is proved that before Mr. Marks made over to Mr. Carrick his rights in respect of the

Black Sturgeon River Limit has had elected to take the lease of the water power to which the conditions of the advertisement for tenders entitled him; and it may safely be assumed, although it is not proved (unless the statements contained in Mr. Marks' letter of February 22, 1917, are evidence against the defendants) that Mr. Carrick had also elected to take the water power to which the acceptance of his tender for the Pic River concession entitled him. It is proved that the Government requested Mr. Carrick to accept the development of power by the Commission and the making of it available for his purposes as a fulfillment of the Government's obligation to grant a lease of a water power (see Prime Minister's letter of March 27, 1917) and I think it must be inferred that Mr. Carrick acceded to the Government's request. (It is proved that the time for the commencement of the work which Mr. Carrick was to perform under the agreement of May 9, 1917, was extended until an adequate supply of electrical power should be made available for him; and it is quite plain that the adequate supply of electrical power meant an adequate supply of power developed by the Hydro-Electric Power Commission. It is proved that everyone - the Government, the Commission and Carrick himself - expected that when the Hydro-Electric power became available Carrick would avail himself of it). Finally it is proved that Mr. Carrick and solicitors acting for him thought - or were prepared to admit - that the Government or the Commission had a right to prevent the use by him, pending the completion of the Hydro-Electric development, of electrical power which he thought that a company having a plant near Port Arthur would be willing to supply. For the proof of these things (except perhaps the last - Carrick's belief) it seems to me that the letters which were objected to were properly receivable in evidence; but even if they are receivable for all purposes they do not prove, as it appears to me, much, if anything, more than has been stated. They do not show what led Mr. Carrick to think that he had no right without special permission to get a temporary supply of power from the Company mentioned; for all that appears he may have thought that, as his work was to be upon lands of the Crown, the Company could not bring its supply to him without the Crown's permission, or he may have thought that some agreement which he had made with the Government expressly or impliedly prohibited his taking electrical power

developed by anyone other than the Commission, or his opinion may have had some basis quite different from either of those suggested. Whatever his reasons was, it is not set forth, and, in my opinion, there is no justification for setting aside all other possible constructions and construing any of his statements as an admission that he had contracted to take power from the Government through the Commission, and from no one else. If he had stated in so many words that he had made such a contract, it appears to me to be at least doubtful whether the statement would have been evidence against the defendants; but the question of admissibility need not be considered unless the statement can be found in the letters, and I do not think it can be found, either expressly or by necessary deduction from something that is said.

A finding that the alleged contract was made would, as it seems to me, have no more certain foundation than a guess as to what may have happened; I have not discovered anything which shows that there is any more reason for saying that the contract was made than there is for saying that no one thought it necessary to exact from Mr. Carrick even an informal promise to take his supply of power from the Government through the Commission. He had to have power; (He had given up his right to insist upon a lease of a water power;) the Government was going to arrange with the Commission to make a supply available for him; self interest would seemingly drive him to draw upon the supply so made available, assuming, of course, that he could get it upon satisfactory terms; why assume, without proof, that he bound himself to do that which probably everyone thought he would do, whether bound or not?

If Mr. Carrick did not agree to take his supply of power from the Government through the Commission, the fact that he stated (if it can be found that he did state) his intention to so take it, and the further fact (if it is a fact) that the Government, thinking that there was no reason to suppose that he would change his intention, induced the Hydro Electric Power Commission to undertake the expensive development at Cameron Falls, can make no difference. He either contracted or he did not; (a truthful representation of an intention is not converted into a contract by the mere fact that the person to whom it is made sees fit to act upon the strength of it without insisting that it be turned into a promise). Kay.- Scheerer Co. v. Chandler and Massey Ltd. (1903) 2 O.W.R.

215: (1914) 4 O.W.R.187; (1915) 36 D.L.R. 130, is a case directly in point. It is not very fully reported, but the judgment of the Ontario Courts can be seen in the printed case on the appeal to the Supreme Court of Canada of which there is a copy in the Library at Osgoode Hall- volume 262. The plaintiffs were importers of surgical instruments carrying on business in New York and having some connections with manufacturing in Germany. The defendants were also importers, carrying on business in Toronto. Surgical instruments were subject to customs duty on importation into the United States but not upon importation into Canada. The plaintiffs represented to the defendants (as the fact was) that they intended to establish a Canadian depot and to keep in it at all times a full supply of their goods imported directly from Europe, and therefore capable of being sold at a lower price than the price at which they could be supplied out of their New York warehouse. They had, in fact, arranged to send an employee to Canada to prepare the way for the establishment of the Canadian department of their business. The defendants, assuming that the plaintiffs would do what they said they were going to do, agreed to cease importing from Europe and to buy all their supplies from the plaintiffs. - an agreement which would have been senseless from the defendants' point of view but for the assumption that the Canadian stock would be available. The plaintiffs, however, changed their minds, and did not open the Canadian depot, and, because there was merely a representative of an intention, and not a promise, the defendants were without redress.

The cases cited by counsel for the Attorney General in support of their argument that it ought to be held that Mr. Carrick agreed to take his supply of power from the Government through the Commission are not, in my opinion, of much assistance. Cammack v. Jones (1949) 3 Ex. 233, and Great Northern Ry. Co. v. Harrison (1852) 12 C. B. 576, are cases in which, upon the true construction of a document, it was plain to the Court that, although technical words to effect the intention were not used, the intention was that the defendant should be bound, in the first case to put in repair and keep in repair the building in question, and in the second case to take the sleepers etc. which the plaintiff was agreeing to supply. They are simply cases of the construction of documents and of apply-

ing the rule that in order to constitute a covenant, no technical words are necessary. It is sufficient if you can collect from the terms of the instrument that the thing is to be done: 3 Ex./at 238. Canada Cycle and Motor Co. v. Mehr (1919) 45 O.L.R. 576, was a case in which the majority of the Judges in the Divisional Court thought that, in the circumstances of the case, Mehr's agreement to buy necessarily involved an agreement on the part of the Company to sell. Churchward v. The Queen (1865) L.R. xx 1 Q.B. 173, a case in which the Court was unable to find the agreement which the plaintiff sought to enforce, was cited for the well known statement by Cockburn, C.J., at p. 195, as to the circumstances in which a court must imply obligations on the part of one party to a contract corresponding with and correlative to those expressly imposed upon the other party - e.g. when the act to be done by the party binding himself can only be done when the act to be done by the party binding himself can only be done upon something of a corresponding character being done by the opposite part - as well as for the supposititious case stated on p. 197 (as to which see Roun v. Mayor &c. of Cambersell (1903) 89 L.T. 595) and for the statement by Mellor, J., on p. 202, to the effect that, if it can be seen that certain stipulations and conditions must have been necessarily intended by the parties, effect must be given to them, although they are not expressed in words. In Ex parte Ford: In re. Chapsell (1895) 16 Q.B.D. 305, there was no evidence that when the mortgagor's brother consented to postpone his charge upon the mortgagor,s property, so that the mortgagor might raise more money, he had any intention of making a present of his security to the mortgagor; and the Court thought there was implied a promise by the mortgagor to indemnify him. In it Lord Esher, M.R. makes a very broad statement as to the circumstances under which a promise may be inferred.

None of these cases, is, in its facts, in the least like the present one; but I do not think that, even if the facts of the cases in which the general statements were made were left out of consideration, any of these general statements would be applicable here. Take the Churchward cease. Cockburn, C. J. puts it that if the thing ~~would~~ to be done by the party binding himself can only be done upon something of a corresponding character being done by the opposite party, you would there imply a corresponding obligation to do the thing necessary for

the completion of the contract, and that so, where there is an engagement to manufacture some article, a corresponding obligation on the other party is implied to take it; and note why: "for otherwise it would be impossible that the partybestowing his services could claim any remuneration." Take also the statement of Hobhouse J., already referred to, that if it can be seen that certain stipulations must have been necessarily intended by the parties, effect must be given to the intention. I do not propose to go through all the cases cited and quote all the general statements made. Those I have mentioned, together with Lord Esher's statement in Ex parte Ford, that "Whenever circumstances arise in the ordinary business of life in which, if two persons were ordinarily honest and careful, the one of them would make a promise to the other, it may properly be inferred that such a promise was given and accepted," will suffice to illustrate what I mean. The fact that they were inapplicable seems to me to appear as soon as they are carefully read, and an effort is made to pick out the particular one which is to be applied. Thus, assuming that there is to be found in the documents an engagement by the Government to cause the supply of power to be developed by the Commission and made available for Mr. Carrick, it cannot be said that that supply of power cannot be made available. unless Carrick is bound to take it; nor can it be said that if Carrick does not take it the Government cannot be remunerated for doing that which it agrees to do. The Government were under obligations to grant a lease of a water power, and asked Carrick to accept, instead of such a lease, the making available of a supply of power developed by the Commission and Carrick, as I think it is proved, acceded to the request. In that agreement on his part, to accept and making available of a supply of power as a performance of the obligation to grant a lease, is ample consideration for any promise on the part of the Government, and there is no need to imply any promise on Carrick's part to give any further or other consideration. The case, then, does not come within the rule stated in Churchward's case. Nor does it come within the rule stated in Ex parte Ford. That rule, in its terms, applies only to circumstances arising in the ordinary business of life, i.e. to circumstances with which the Courts are so familiar that they can say with some feeling of certainty that ordinarily honest and careful men do, in those circumstances, make the promise which they

proceed to hold that the person in question did make. But in this case we have very unusual circumstances; a man has contracted to erect and operate an extensive plant for turning into paper certain wood, and he is to pay royalties for the privilege of cutting the wood; he has been promised a water power and has probably calculated what the cost of developing it will be; he is asked to accept, instead of that water power, the privileges of obtaining a part of certain electrical power which the other contracting party is about to cause to be developed; but, except for a general statement that the power will be supplied "at cost" he is not - as far as appears - told what the expense to him will be, or given other particulars; he agrees that if the supply is made available he will not insist upon having the promised water power; can any Court say that it shows that the ordinary honest and careful man in such circumstances does agree to take his supply of power from the proposed source , and, therefore, that it is justified in inferring that the man in question did so agree? I think not.

My conclusion upon this branch of the case is, that there is no document which can be construed as containing an agreement on the part of Mr. Carrick to take power from the Government through the Commission; that there is not justification for implying or inferring such an agreement on his part; that the most that can be said is that he had and expressed, an intention to take the power; but that Eby -Scheerer Co. v. Chandler & Massey Ltd. (supra) and the cases there refferred to show that no action can be based upon such an expression of opinion.

There is a further difficulty in the plaintiff's way. If it could be found as a fact that Mr. Carrick did make the contract alleged, there is no principle that I know of upon which it can be held that that contract can be enforced against the defendants.

So far as I can discover, the cases in which a person - without contract upon his part - becomes bound by the undertakings of his predecessor in title are either cases in which the assignee of a term is bound by those covenants of his assignor (the lessee) which run with the land, or cases in which the grantee of land is bound by covenants entered into by his predecessor in title of which he had notice at the time when he acquired his title : See the notes to Spencer's case, 1 S. L.C. (12th ed.) at pp. 97-98. I proceed, therefore, to consider whether the defendants can be made liable by the application

of any rule applicable where the relationship of the parties is that of a landlord and the assignee of the term, or that of covenantee and the assignee of the land in respect of which the covenantor's covenant was given.

To take first the case last mentioned the case of the covenantee suing the assignee of the covenantor. The defendants do not hold any land to which they trace their title through Mr. Carrick; but the subject matter of the agreement of May 9, 1917, the license to cut wood and to do the things incidental to cutting it and making it into paper, such as to erect mills, etc was, I think, an incorporeal hereditament; In re Thier Lumber Company's Assessment (1907) 14 O. L. R. 210; and covenants made by the owners of such incorporeal hereditaments seem to be within the rules applicable to covenants made by the owners of the land; Norval V. Pascoe (1865) 34 L. J. Ch.33; Hooper v. Clark (1867) L. R. 2 q.B. 200. Therefore, if the other conditions requisite to the maintenance of the action exist, the fact that the covenant was not made by the owner of land does not seem to present much difficulty. Perhaps also, the fact that the supposed agreement was an affirmative agreement to take the power from the Government, and not, in form, one of those restrictive covenants to which alone the rule applies- see Haywood v. Brunswick Permanent Building Society (1881) 8 Q.B.D.403; London and South Western Railway Co v. Comm (1882) 20 Ch. D. 562; Austerberry v. Oldham Corporation (1885) 29 Ch. D. 750; Ferris v. Ellis (1920) 48 O.L.R. 374; 1 am.L.C.101-might be got over by treating the positive agreement as involving a negative one not to obtain power elsewhere, and enforcing it by injunction; see Clegg v. Hands 1890) 44 Ch D. 503, 519. But even if these difficulties are out of the way, there remain two others which seem to be insurmountable. First, there is the fact that the supposed covenant was not made with the Government as the owner of land which was to be benefitted by it, and the doctrine "does not extend to the case in which the covenantee has no land capable of enjoying, as against the land of the covenantor, the benefit of the restrictive covenant; if the covenant does not run with the land in law, its benefit can only be asserted against an assign of the land burdened, if the covenant was made for the benefit of certain land, all or some of which remains in the poss-

cession of the covenantee or his assign suing to enforce the covenant" London County Council v. Allen- (1914) 3 K.B. 642,660, 672, Secondly there is no evidence that the defendants took their assignment with notice of any such restrictive covenant having been made by Mr. Carrick. If the covenant could be read into the agreement of May 8, 1918, and if it could be assumed that that agreement was handed over to the defendants by Messrs Seaman and Alsted, it could be found as a fact that they took their assignment of the agreement of May 9, 1917 with notice of the covenant. There is no other possible way as I think upon the evidence given, of bringing notice home to them. But it is , in my opinion, impossible to read the agreement of May 8, 1918, as evidencing, or, by its recital, suggesting the existence of such a covenant. The recital is that there was an agreement between the parties to the agreement of May 9, 1917, and to the document in question that a supply of power should be available to Mr. Carrick for his purposes; which is far from a recital that Carrick had agreed that he would not use, in connection with his work, power obtained from any one other than the Government. For these reasons, I think the covenant even if proved, could not be enforced against the defendants invirtue of any rule applicable as between a covenantee and a grantee from the covenanter.

Turning now to the rules applicable as between a lessor and an assignee of the term, the case seems to be equally plain. In order that these rules should be applied, the document of May 8, 1917, conferring upon Mr. Carrick the right to cut the weed would have to be considered a lease. It is not clear to me that it would be right so to consider it, but, for the purposes of the discussion, I will assume that it is a lease. The subject matter of it is, as has been stated, an incorporeal hereditament; and the Statute 32 Henry 8c. 34, would apply, so that an assignee from the Crown of the reversion could sue upon any covenant in the agreement running with the incorporeal hereditament demised; Martyn v.Williams (1857) 1 H & N 817 at 826 et. seq; an assignee from the licensee could be sued upon such of the licensee's covenants as run with the subject matter of the license. Jervel v.Jarcee (1924) 34 T.L.R. 82.A covenant by the licensee to use, in the operation of the mills situate on the land mentioned in

the license, electrical power supplied by the licensor would probably run with what is called in the head note to Norval v. Pascoe "the subject matter of the grant," in the same way as an agreement by the lessee of a public house to take his beer from the lessor would run with the land demised; see Clegg v. Hands (1890) 44 Ch. D. 503; Manchester Brewery Co. v. Coombs (1901) 2 Ch. 608. If, then, Mr. Carrick did covenant with the Crown to take his electrical power from the Crown through the Hydro-Electric Power Commission using the word "covenant" in the sense in which it is used in the case - the plaintiff's claim is established; the covenant runs with the "subject matter of the grant" and the defendants can be sued upon it. But he did not "covenant" in such sense. In the first place, unless the agreement is contained in the document of MAY 8, 1918 (which is not where the pleadings, which state it was made in March, say it can be found) it is not a covenant in the proper sense of the word,- it is not contained in an instrument under seal - and, while there are many cases in the United States in which Courts, in dealing with the rule now under discussion, seem to treat an agreement, however, made, as a covenant, e.g. Rue v. Lemly (1906) 93 S.W. Rep. 570; Ferguson v. Worrel (1907) 101 S. W. Rep. 906; Bjoblom V. Mark (1908) 114 N.W. Rep. 746, I have not found any English case in which the rule was applied to anything other than a contract contained in a sealed instrument. Secondly, the covenant must be contained in the instrument creating the term. The rule is thus stated by Lush J. in Elliott v. Johnson (1866) L.R. 2 Q. B. 120 "The doctrine of conditions running with the land is confined to covenants annexed to the land by the indenture of demise." In Redman's Law of Landlord and Tenant (7th ed. 1920) Elliott v. Johnson is cited, and it is said: "The doctrine of covenants running with the land applies only where the demise is under seal and the covenant is annexed to the estate by the instrument which creates it." See also Fox's Relationship of Landlord and Tenant (5th Ed. 1914) p. 412.

Counsel for the plaintiff invoke another principal, stated in Anson on Contracts (15th ed.) p. 292, as follows:- "The assignee of contractual rights must take care to ascertain the exact nature and extent of those rights; for he cannot take more than his assignor has to give, or be exempt from the effect of transactions by which the

signor may have lessened, or invalidated the rights assigned." I think however that the case cited by the author makes it plain that the rule stated has nothing to do with what is here under discussion, viz. the rights of the Crown to compel the defendants to perform a contract alleged to have been made by Mr. Carrick. I think that no more was intended to be stated in the text book, and that no more is decided in the cases cited, than that the assignee of a chose in action takes subject to equities. The rule does apply so as to defeat the claim set up by the defendants, in their counterclaim for a declaration that the defendants are entitled to a lease from the Crown of a suitable water power; for Mr. Carrick agreed that if power developed by the Hydro Electric Commission was made available he would not insist upon his right to a lease; and the defendants, taking subject to the equities which could have been set up if there had been no assignment, cannot insist upon a lease if the Crown prefers to make available power developed by the Commission, rather than to grant a lease; but any right which there may be on the part of the Crown to compel the defendants to take power developed by the Commission must be attributed to some covenant made by Mr. Carrick which has become enforceable against the defendants by reason of the assignment to them of the concessions granted by the agreement of May 9, 1917.

For the foregoing reasons, I am of opinion that the plaintiff's action fails.

In the counterclaim the defendants ask (1) for a declaration that they are not bound to take power form the Government through the commission at cost, irrespective of what the cost may be and subject to onerous conditions. As I have held that the plaintiff cannot compel the defendants to take the power, it is unnecessary to consider whether the defendants are entitled to set up this counterclaim without first obtaining a fiat authorizing them to do so. They ask (2) for a declaration that they are entitled to a lease of a water power. I have held that they are not, or that they are not unless the Government fail to make available,at cost,power developed by the Commission. They seek (3) declaration that they are at liberty to obtain a supply of electrical power from other persons, firms or corporations. As I have decided that the plaintiff is not entitled to an injunction to restrain them from

doing that which they ask to be declared entitled to do, it is unnecessary to deal with this part of their prayer, or to decide whether the claim can be made without a fiat. Finally, they ask (4) for a declaration that there have been breaches and default in the obligations to furnish a supply of power, and that they are entitled to damages. I do not really know what this means. If the agreement of May 8, 1918, postponing the time for the commencement of Mr. Carrick's work, amounts to an agreement on the part of the Government to make available a supply of power developed by the Commission ---which I doubt, it does not contain any promise to make that supply available within any particular time, and I do not see how it can be said that there has been default. It is, therefore, unnecessary to consider whether this claim can be made without a fiat.

The action will be dismissed. There will be no judgment upon the counterclaim. The Plaintiff ought to pay the costs, none of which, so far as appears, are specially referable to the counter-claim.